132

No. 08-824

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
FEB 17 2009
OFFICE OF THE CLERK

JAMES E. PIETRANGELO, II,

Petitioner,

v.

ROBERT M. GATES, *et al.*,

Defendants-Respondents;

THOMAS COOK, *et al.*,

Plaintiffs-Respondents.

OPPOSITION TO PETITIONER'S MOTION TO STRIKE, MOTION TO WITHDRAW BRIEF FOR THE COOK RESPONDENTS FILED JANUARY 26, 2009, AND NOTICE OF INTENTIONS

TABLE OF AUTHORITIES

Rules

S. Ct. R. 12.6 2

Other Authorities

EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE (9th ed. 2007) 2

http://origin.www.supremecourtus.gov/docket/06-1457.htm 7

http://origin.www.supremecourtus.gov/docket/07-588.htm 7

http://origin.www.supremecourtus.gov/docket/07-984.htm 7

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1457.pdf 6

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-588.pdf 4

http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-984.pdf 5

http://www.usdoj.gov/osg/briefs/2007/3mer/2mer/2006-1457.mer.aa.pdf 6

http://www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-0588.mer.aa.pdf 4

http://www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-0984.mer.aa pdf 5

Nos 06-1457 and 06-1462, *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1 of Snohomish County, Wash.*, Br. of Respondent Federal Energy Regulatory Commission in Opposition (Aug. 2007), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2006-1454.resp.pdf 5

Nos. 07-588, 07-589, and 07-597, *Entergy Corp.* v. *EPA*, Br. for the Federal Respondents in Opposition 25 (Feb. 2008), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2007-0588.resp.pdf 4

Nos. 07-984 and 07-990, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council*, Br. of Federal Respondents in Opposition 6 (May 2008), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2007-0984.resp.pdf 4

Petitioner Pietrangelo has moved to strike the brief, in response to his petition, filed on behalf of the Cook respondents on January 26, 2009, by counsel from the law firm of Wilmer Cutler Pickering Hale and Dorr LLP and the Servicemembers Legal Defense Network. As the responding brief states (at 7 n.7), those counsel represented all the original plaintiffs in this matter, including Mr. Pietrangelo, until shortly after the district court dismissed the complaint. Mr. Pietrangelo contends that counsel have violated ethical duties they owe to a former client by filing a brief opposing that former client's certiorari petition, and also that the Rules of this Court do not authorize what he calls an "unheard-of" brief by parties who were aligned in their legal positions in the courts below but have opposing views about whether this Court should grant certiorari.

The counsel who filed the January 26, 2009, brief will make their own submission explaining the actions they are taking in response to Mr. Pietrangelo's allegations. This submission, by counsel newly retained (on a pro bono basis) to represent the Cook respondents, will (1) respond substantively to Mr. Pietrangelo's motion to strike; (2) request withdrawal of the existing brief notwithstanding the incorrectness of Mr. Pietrangelo's position concerning this Court's Rules and practices; and (3) give notice of the Cook respondents' intention to treat March 6, 2009, or such later date as this Court may set for the filing of briefs in response to the certiorari petition, as the deadline for any filing the Cook respondents may make to substitute for the withdrawn brief.

1. a. Mr. Pietrangelo contends (Mot. 2-3) that the Cook respondents' brief is an improper "end-run" around this Court's Rules. That is not correct.[1]

As the Cook respondents' January 26 brief itself explains (at 1 n.1), the Cook respondents were parties to the proceedings below. Once another party filed a petition (not identifying the Cook respondents as continuing parties in this Court), they may well have been required to participate at the petition stage in order to protect their interests in the event the Court did grant review. *See* S. Ct. R. 12.6 ("Parties who file no document will not qualify for any relief from this Court."). In any event, under the Court's Rules they were plainly entitled to do so. *Ibid.* Contrary to Mr. Pietrangelo's assertion (Mot. 3, 7), it is neither improper nor "unheard of" for a party to decide not to seek certiorari on its own behalf, but to respond to another party's petition by supporting the petitioner's position on the merits while expressing a different view concerning whether the case is appropriate for discretionary review by this Court.

The practice Mr. Pietrangelo decries is in fact so well established that a four-page section of the leading treatise on Supreme Court practice is devoted to this situation and some variants. See EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE § 6.20, at 436-439 (9th ed. 2007). As the authors note: "For procedural purposes the unnamed party" – that is, a party to the proceedings below who, like the Cook respondents, is not mentioned in the certiorari petition – "is automatically assigned the role of respondent or appellee, regardless of the nature of his or her interest ([citations omitted]), and the unnamed party should so indicate in the caption of any briefs or other documents. Such a party is of course free to file whatever response or brief may

[1] Newly retained counsel understands, from discussions with a majority of his new clients (discussions in which their prior counsel did not participate), that Mr. Pietrangelo's factual speculation about events and decisions leading up to the filing of the Cook respondents' brief is inaccurate.

be appropriate in the light of the petition for certiorari." *Id.* at 437. Furthermore, "where the automatic respondent actually supports the position of the named respondent" – which is emphatically not the case here, because the Cook respondents believe the "Don't Ask, Don't Tell" statute to be unconstitutional, but the United States and its officials have persistently defended its constitutionality – "or where their interests coincide or coalesce in opposition to the petitioner, the normal schedule applies for filing opposing briefs or briefs on the merits." *Id.* at 438. To the extent that the Cook respondents oppose Mr. Pietrangelo's certiorari petition, despite their agreement with Mr. Pietrangelo's position on the merits, their deadline for responding to Mr. Pietrangelo's petition is therefore the same as the deadline for the federal respondents.[2]

There are numerous examples of cases in which a party has lost below (like the Cook respondents) has opposed a certiorari petition filed by a different party who lost below (like Mr. Pietrangelo), and has declared and/or followed through on an intention to file in support of the petitioner if this Court does grant certiorari. Two cases this Court has heard on the merits this Term are of that variety. See Nos. 07-588, 07-589, and 07-597, *Entergy Corp.* v. *EPA* and related cases, Br. for the Federal Respondents in Opposition 25 (Feb. 2008), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2007-0588.resp.pdf ("Although the decision below is incorrect in important respects, and has great potential practical importance, and the government would support reversal in the event that certiorari were granted, the petitions for a

[2] New counsel is in the process of consulting with his clients, the Cook respondents, to ascertain whether – after being advised by counsel who never represented Mr. Pietrangelo – they wish to oppose the certiorari petition. If they determine not to oppose the certiorari petition, counsel will file nothing further on their behalf, as the time for the Cook respondents to file a certiorari petition of their own has elapsed. If they determine to oppose the certiorari petition, they will act within the time allowed for respondents to file briefs in response to the certiorari petition.

writ of certiorari should be denied.");[3] Nos. 07-984 and 07-990, *Coeur Alaska, Inc.* v. *Southeast Alaska Conservation Council* and related case, Br. of Federal Respondents in Opposition 6 (May 2008), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2007-0984.resp.pdf ("The government agrees that the court of appeals erred. There is, however, no division among the courts of appeals on that question. And while the question presented is important, it does not appear to be sufficiently important to warrant this Court's review at this time. Accordingly, the petition for a writ of certiorari should be denied. If this Court were to grant the petition, however, the government would support the position of petitioners.").[4]

It happened at least once last Term as well. See Nos. 06-1457 and 06-1462, *Morgan Stanley Capital Group, Inc.* v. *Public Utility District No. 1 of Snohomish County, Wash.*, and related case, Br. of Respondent Federal Energy Regulatory Commission in Opposition (Aug. 2007), available at http://www.usdoj.gov/osg/briefs/2007/0responses/2006-1454.resp.pdf.[5]

The Cook respondents have done nothing more and nothing less than what the similarly situated respondents in the three cases just cited did, and what the definitive treatise on Supreme

---

[3] The federal respondents did in fact file a brief in support of petitioners on the merits after this Court granted certiorari over their opposition. The brief is available at http://www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-0588.mer.aa.pdf. Furthermore, the federal respondents participated in the oral argument on December 2, 2008. The transcript of the oral argument is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-588.pdf.

[4] The federal respondents did in fact file a brief in support of petitioners on the merits after this Court granted certiorari over their opposition. The brief is available at http://www.usdoj.gov/osg/briefs/2008/3mer/2mer/2007-0984.mer.aa.pdf. Furthermore, the federal respondents participated in the oral argument on January 12, 2009. The transcript of the oral argument is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-984.pdf.

[5] The Federal Energy Regulatory Commission did in fact file a brief in support of petitioners on the merits after this Court granted certiorari over FERC's opposition. The brief is available at http://www.usdoj.gov/osg/briefs/2007/3mer/2mer/2006-1457.mer.aa.pdf. Furthermore, FERC participated in the oral argument on February 19, 2008. The transcript of the oral argument is available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-1457.pdf.

Court practice says that any Rule 12.6 respondent (not just those represented by the Solicitor General) may do. There is no violation of the Rules.

b. Mr. Pietrangelo also argues (Mot. 4-7) that his case is ripe for review on the merits. To the extent Mr. Pietrangelo's argument addresses jurisdictional ripeness, the Cook respondents have not suggested that the case is unripe in that sense. This Court may plainly consider and decide the case on the merits if it chooses to do so. If it does, the Cook respondents have made clear that they, like Mr. Pietrangelo, will support reversal of the judgment below.

Mr. Pietrangelo's remaining arguments question the substance of the Cook respondents' explanation of why they did not seek review in this case, even though the decision below is wrong and involves important issues, and why they believed that decision might not satisfy this Court's prudential standards for the exercise of its *discretion* to grant certiorari review. Those are appropriate arguments for Mr. Pietrangelo to make in his reply brief, if the Cook respondents after consultation with new counsel adhere to the position they took in the brief filed January 26, 2009. The Court should consider both the Cook respondents' arguments and Mr. Pietrangelo's arguments in deciding whether to grant review. Those arguments do not, however, provide any basis for striking the Cook respondents' brief.

2. Despite the lack of merit in Mr. Pietrangelo's motion to strike, the Cook respondents hereby move to withdraw the brief filed January 26, 2009. Consultation with new counsel who has never represented Mr. Pietrangelo, and the filing of a new brief opposing certiorari if the Cook respondents continue to believe that they should oppose certiorari, will best allow this Court to consider the parties' contentions free of collateral issues about counsel's ethical obligations. As noted above, the deadline for any such brief is March 6, 2009, which is

the federal respondents' current due date, or such other date as the Court may set by granting any of the respondents a further extension if one is requested.[6]

3. As noted above (see note 2, *supra*), new counsel is in the process of consulting with his clients to ascertain their wishes concerning opposing or not opposing certiorari. The result will be either no filing at all, or a filing opposing certiorari on or before the same due date as the federal respondents' brief in response to Mr. Pietrangelo's certiorari petition. Counsel currently contemplates that he may file a brief on or before March 6, 2009, in substantially the same form as the brief that was filed on January 26, 2009, but intends to continue the process of consultation with the clients to be sure that such a brief accurately represents their position before any such brief is filed, or to alter course if a course alteration is necessary to carry out the clients' wishes.

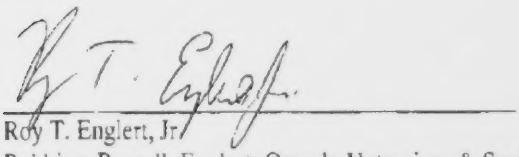
CONCLUSION

Although Mr. Pietrangelo's motion to strike the Cook respondents' brief is without merit, the Court should grant the Cook respondents leave to withdraw the brief filed January 26, 2009, which would have the effect of mooting Mr. Pietrangelo's motion. The Cook respondents' new brief in response to the certiorari petition, if any, will be filed by March 6, 2009, or such other date as this Court may direct by granting an extension of the time for response to Mr. Pietrangelo's certiorari petition.

---

[6] In the *Entergy*, *Coeur Alaska*, and *Morgan Stanley* cases discussed above – in each of which there were respondents that supported petitioners on the merits but originally opposed certiorari – the briefs in opposition for those respondents were filed on or about the same date as the briefs in opposition for the respondents that had prevailed below. See 07-588 docket at http://origin.www.supremecourtus.gov/docket/07-588.htm; 07-984 docket at http://origin.www.supremecourtus.gov/docket/07-984.htm; 06-1457 docket at http://origin.www.supremecourtus.gov/docket/06-1457.htm. In none of those cases did the respondent opposing certiorari meet the 20-day deadline set by Rule 12.6 for a filing by a respondent that supports petitioner with respect to a grant of certiorari as well as with respect to the merits.

Respectfully submitted,



Roy T. Englert, Jr.
Robbins, Russell, Englert, Orseck, Untereiner & Sauber LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500
renglert@robbinsrussell.com

February 17, 2009